IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 598 of 1994

For Approval and Signature:

HON'BLE MR.JUSTICE S.R.BRAHMBHATT

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

RATUBHA JILUBHA

Versus

DY COMMISSIONER OF POLICE

Appearance:

1. Special Civil Application No. 598 of 1994

MR IS SUPEHIA for Petitioner No. 1

MS. D.S. PANDIT, LD. AGP for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE S.R.BRAHMBHATT

Date of decision: 23/12/2004

ORAL JUDGEMENT

1. Heard Mr. I.S. Supehia, learned counsel for the petitioner and Ms. D.S. Pandit, learned AGP for the

respondent.

2. The petitioner is serving as Unarmed Police Constable in the city of Ahmedabad under the respondent. The petitioner was convicted for an offence under section 498-A of the I.P. Code in Criminal Case No. 123 of 1987 by the learned Addl. Sessions Judge, Ahmedabad vide the judgment dated 30-6-1989 and was sentenced to undergo R.I. for one year and a find of Rs.1000-00, in default thereof to suffer imprisonment for 2 months. The petitioner as it appears from the record has preferred Criminal Appeal No. 407 of 1989, which according to the petitioner has been admitted and is pending for final disposal. The petitioner has been released on bail.

2. The Deputy Police Commissioner, North Zone, Ahmedabad City, issued a show cause notice on 17-3-1990 to the petitioner for passing appropriate order on the ground that the petitioner was convicted under the criminal case No.123 of 1987 vide order dated 30-6-1989. The petitioner filed his reply to the same on 26-4-1990 and thereafter, the petitioner was also given personal hearing on 11-5-1990 as it is submitted by the petitioner. The petitioner, as stated in his petition, relying upon Rule 156 and Note thereto and also relying upon the circular dated 1-8-1966 Dy. Police Commissioner North Zone, vide order dated 22-5-1990 suspended the proposed punishment contained in his show cause notice dated 17-3-1990, till the decision of the criminal appeal No. 407 of 1989 filed by the petitioner before this Court challenging the order of conviction and judgment dated 30-6-1989 in criminal Case No. 123 of 1987.

3. The petitioner has further stated in his petition that the successor to the Dy. Police Commissioner, North Zone, issued an order on 3-1-1994 revoking her predecessor's order dated 22-5-1990, whereunder the proposed penalty of dismissal was suspended and the petitioner was ordered to be heard afresh on the earlier show cause notice. A memo came to be issued to the petitioner on 3-1-1994 requiring him to attend the office on 7-1-1994 for personal hearing in respect of the earlier show cause notice dated 17-3-1990. The petitioner had requested for adjournment which was granted to the petitioner.

4. Being aggrieved and feeling dissatisfied with the order dated 3-1-1994 (Annexure-B) petitioner has preferred the present petition under Article 226 of the Constitution of India.

5. The petitioner has mainly contended that the impugned order dated 3-1-1994 ought not to have been passed in view of the fact that the petitioner's criminal appeal no. 407 of 1989 against his conviction recorded in criminal case no. 123 of 1987 dated 30-6-1989 has been admitted by this Court, and the petitioner is released on bail. In support of his contention he relied on the note to the Rule 156 of Bombay Civil Services Rules, and Government Circular dated 1-8-1966. petitioner has contended that in view of the note to the Rule 156 of BCS Rules the impugned order dated 3-1-1994 could not have been issued and he further submitted that the earlier order dated 22-5-1990 passed by the then Dy. Police Commissioner was proper and the same ought not to have been revoked and the show cause notice dated 17-3-1990 ought not to have been revived. Learned counsel further submits that though it is true that the Government Circular dated 1-8-1966 has been revoked as it is observed in the impugned ordered dated 3-1-1994, however the statutory Rule 156 has not been revoked and in view of the specific note below Rule-156 of BCS Rules the impugned order dated 3-1-1994 ought not to have been issued. The petitioner has further submitted that as per the instructions which he has annexed at Annexure-D also the show cause notice dated 17-3-1990 ought not to have been revived. The petitioner has also taken up a contention that the impugned order dated 3-1-1994 is passed by the respondent quashing and setting aside her predecessor's order dated 22-5-1990 which amounts to reviewing the order of her predecessor and as such the said review was not permissible, and therefore, the order dated 3-1-1994 is not tenable in eye of law. The petitioner has also placed reliance upon the judgment dated 8-12-1988 in case of AHMEDKHAN INAYATKHAN VS. D.S.P. BANASKANTHA AND ANOTHER, reported in 1990 (1) S.L.R. 108 in support of his contention.

6. Ms. Pandit, learned AGP on behalf of the respondent has submitted that the impugned order dated 3-1-1994 is absolutely just, proper and the same deserves to be upheld. She has further submitted that the competent authority i.e. Dy. Police Commissioner Zone-IV has by her order dated 3-1-1994 merely revived the show cause notice dated 17-3-1990 which is well within her powers. She has further submitted that the earlier order of Dy. Police Commissioner, North Zone dated 22-5-1990 was passed relying upon the circular dated 1-8-1966 which in fact had been revoked by the subsequent circular dated 6-4-1989. She has further submitted that even on the established principle of law governing the convicted Government employee, the impugned

order dated 3-1-1994 deserves to be upheld as it is merely reviving a show cause notice dated 17-3-1990. Ms. Pandit has further submitted that the petition is not tenable in view of the fact that the petitioner has challenged the order dated 3-1-1994 which in fact has the effect of merely reviving the show cause notice dated 17-3-1990. She has further submitted that this Court may not interfere in the process as the petitioner has sought intervention of this Court on the interlocutory stage of show cause notice only.

7. The petitioner's contentions deserves to be examined in the light of the applicable rules governing the case of the petitioner. The petitioner is an Unarmed Police Constable and hence he is governed by the Bombay Police Act 1951. The petitioner would not be governed by the Gujarat Civil Services (Discipline & Appeal) Rules 1971 as it is specifically mentioned in the Gujarat Civil Services (Discipline & Appeal) Rules 1971, under Rule-1 (c) that " nothing in these rules shall apply to any Government servants who are members of All India Services or who are Inspectors of Police or Members of the Subordinate ranks of the Police Force." Sub section (4) of section 2 of the Bombay Police Act 1951 defines 'Constable" means a police officer of the lowest grade and sub section (11) of section 2 defines Police Officer means any member of the police force appointed or deemed to be appointed under this Act and includes Special or Additional Police Officer appointed under section 20 or 22. Thus the petitioner is admittedly governed by he Bombay Police Act, 1951.

8. The law on the point of dealing with the convicted Government servant during pendency of appeal is now well settled by the catena of judgments of the Supreme Court and this Court. The Full Bench of this Court in case of P.D. WAGHELA & ORS. VS. G.C. RAIGER, DEPUTY I.G.P. & ORS, reported in 1994 (1) GLR pg. 240 has categorically observed that :-

> " The conviction spoken to in clause (a) of the second proviso to clause (2) of Art. 311, to form a basis for the dismissal, removal or reduction in rank, could be one recorded by a competent Criminal Court in the first instance and the preferring of an appeal or revision against such conviction and the pendency of the same will not alter the position and action, taken on the basis of such conviction, need not conform to clause (2) of Art. 311, since by the express terms of the second proviso thereto,

clause (2) of Art. 311 is dispensed with. "

Thus in view of the Full Bench decision cited hereinabove the petitioner's reliance upon the ratio of Ahmedkhan Inayatkhan (supra) is of no avail to the petitioner and the petitioner's contention deserves to be rejected. However, while considering the larger issue the Full Bench in case of P.D. Waghela & Ors (supra) has observed that 'it did not express any view on the effect of rules / circular and instruction providing for different contingencies and speaking in different language'. In view of this the note below Rule 156 of BCS Rules and the provisions of the Bombay Police Act, and the Bombay Police (Punishment & Appeal) Rules 1956 deserve to be examined.

9. The contention in respect of Note below Rule-156 and its purport has already been examined and answered by this Court in case of H.N. RAO Vs. STATE OF GUJARAT & ORS, reported in 2001 (2) GCD 945 (Guj). In para-5, this Court has observed as under:-

" 5. The question whether a Government servant who has been convicted of an offence can be dismissed from service pending appeal against conviction was the issue referred to the Full Bench of this Court in the matter of P.D. Waghela & Ors. [Supra]. This Court, considering the various provisions of law and rulings of the Hon'ble Supreme Court, held that 'the conviction spoken to in Clause (a) of the second proviso to Clause (2) of Art. 311, to form a basis for the dismissal, removal or reduction in rank, could be one recorded by a competent Criminal Court in the first instance and the preferring of an appeal or revision against such conviction and the pendency of the same will not alter the position and action taken on the basis of such conviction, need not conform to Clause (2) of Art. 311, since by the express terms of the second proviso thereto, Clause (2) of Art. 311 is dispensed with. 'The same is the view expressed by the Hon'ble Supreme Court in the mater of V.K. Bhaskar [Supra]. In light of this consistent view taken by the Full Bench of this Court and the Hon'ble Supreme Court, the contention raised by Mr. Supehia requires to be rejected. Mr. Supehia has submitted that even otherwise, Rule 156 of the Bombay Civil Service Rules enjoins upon the Government not to proceed against such delinquent servant departmentally whose appeal

> against conviction is pending before the High Court, till the result of the appeal. I am afraid, the contention is not tenable. Rule 156 of the Bombay Civil Service Rules essentially deals with suspension of a Government servant against whom proceedings have been taken on a criminal charge. Note thereto emphasises necessity or early disposal of the departmental proceedings against such Government servant and provides that, ' it is, therefore, necessary to ensure that departmental proceedings against the government servant should; save in cases referred to in the succeeding sentence, be concluded as soon as possible, after the case against him is decided in the first Court. In case where a government servant is convicted by the Competent Court and sentenced to imprisonment, the departmental proceedings against him should not, however, be completed till the result of an appeal, if any, to a Higher Court is known.' The language of the said note suggests the intention of the rule making authority. The said note is merely a guideline to the concerned authorities and cannot be said to be a rule of binding nature. It is merely directory provision and not a mandatory one; though the words used are 'should not'. I am, therefore, of the opinion that in view of the law settled in the matter of P.D. Waghela & Ors [Supra] and V.K. Bhaskar [Supra], the instruction contained in the said note loses significance and cannot be pressed into service."

Thus the contention in respect of Note below Rule 156 of BCSR also deserves to be rejected.

10. One may submit that the provision for dispensing with the departmental inquiry on conviction of the government employee is absent in the Bombay Police (Punishment & Appeal) Rules 1956 and in view of Rule-2 of the Bombay Police (Punishment & Appeal) Rues 1956 no Police Officer to whom this rule applies shall be departmentally punished otherwise than in accordance with the provisions of this rule, the convicted police constable has right to be punished only after the full-fledged departmental inquiry in accordance with the Bombay Police (Punishment & Appeal) Rules, 1956.

11. This could be answered by referring to the provisions made in the Bombay Police Act, 1951. It is to be noted that the Bombay Police Act, 1951 governs the

petitioner. Bombay Police (Punishment & Appeal) Rules, 1956 has been framed in exercise of powers conferred by the Clause (c) of sub section (2) of section 25 read with section 5 (b) of the Bombay Police Act, 1951. Thus Bombay Police (Punishment & Appeal) Rules 1956 have been essentially framed for dealing with a situation envisaged for the purpose of meeting with the requirement of clause (c) of sub section (2) of section 25, read with section 5 (b) of the Bombay Police Act, 1951.

Rule 26 is eloquently clear on this point. Section 26 of the Bombay Police Act, 1951 deserves to be set out as it deals with procedure to be observed in awarding punishment.

"26. Procedure to be observed in awarding punishment - When any officer passes an order for fining, suspending, reducing, removing or dismissing Police Officer, he shall record such order or cause the same to be recorded, together with the reasons therefor and a note of the inquiry made, in writing, under his signature:

Provided that [no order for reducing, removing or dismissing a Police Officer] shall be passed without giving him a reasonable opportunity of showing cause against the action proposed to be taken against him except in cases referred to in the proviso (a) to clause (2) of Article 311 of the Constitution. "

311. Dismissal, removal or reduction in rank of persons employed in civil capacities under the Union or a State. - (1).....

[(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges]

[Provided that.....]

[Provided further that this clause shall not apply-]

(a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or. "

Thus the substantive proviso of section 26 amply provides as to how the convicted government employee to be dealt with. In view of this the petitioner's contention deserves to be rejected.

12. Thus in view of the aforesaid discussions it becomes clear that the petitioner's contention deserves to be rejected. The petitioner's contention that the impugned order dated 3-1-1994 amounts reviewing the earlier order dated 11-5-1990 is also bereft of any merit in view of the fact that the impugned order in fact has been passed by the competent authority reviving the show cause notice dated 17-3-1990 only. The exercise of power of reviving the show cause notice cannot be termed to be an exercise without jurisdiction. More over in view of the established principle of law in respect of the convicted government servants during pendency of appeal and in light of catena of judgments on the point, this Court is of the view that the order does not suffer from any infirmity.

13. It is to be noted as this stage that the petitioner has challenged the impugned order dated 3-1-1994 which in fact has the effect of reviving only the show cause notice dated 17-3-1990. The petitioner has therefore approached this Court under Article 226 of the Constitution of India challenging reviving of show cause notice dated 17-3-1990. The Division Bench of this Court in case of CHHATRASINH N. CHAUHAN Vs. SECRETARY, WATER RESOURCES DEPARTMENT & ANR, reported in 2000 (3) GCD 1755 (Guj) observed that " Ordinarily under Art. 226 of the Constitution of India, High Court would not quash departmental inquiry'. In light of this position of law in respect of exercise of power under Article 226 of the Constitution India, in respect of the show cause notice, it is clear that the petition which challenges the revival of show cause notice is not tenable in eye of law. In view of the aforesaid facts & circumstances and in view of the established provisions of law, this Court is of the view that the petition is bereft of merits and the same deserves to be dismissed, and accordingly the same is dismissed. Interim relief stands vacated. Rule discharged with no order as to costs.

Dt: 23-12-2004 (S.R. BRAHMBHATT, J)

/vgn